



December 7, 2000

Ms. Esther Cortez  
Personnel Director  
Hidalgo County Personnel Department  
100 E. Cano, Suite 102  
Edinburg, Texas 78539

OR2000-4623

Dear Ms. Cortez:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 141956.

Hidalgo County (the "county") received a request for background employment information relating to the Head Start director and for information relating to grievances filed against the Head Start director. You claim that the requested information is excepted from disclosure under sections 552.101 and 552.102 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted.<sup>1</sup>

Initially, we note that the records in question include information that is subject to required public disclosure under section 552.022 of the Government Code. Section 552.022 provides in relevant part:

a) [T]he following categories of information are public information and not excepted from required disclosure under [chapter 552 of the Government Code] unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

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<sup>1</sup>We note that the submitted records do not include the requested background employment information. Therefore, if the county has not released that information already, it must do so at this time. See Gov't Code §§ 552.006, .301, .302; Open Records Decision No. 664 (2000). We caution you that chapter 552 of the Government Code makes the release of confidential information a criminal offense. Gov't Code § 552.352.

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(1), (17). We have marked the documents that are encompassed by these provisions of section 552.022. Section 552.022(a) requires the county to release those documents to the requestor, unless they contain information that is expressly confidential under other law.

You claim that all of the submitted records are confidential under sections 552.101 and 552.102 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," including information that is encompassed by the common law right to privacy. *See Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information must be withheld under section 552.101 in conjunction with common law privacy when (1) it is highly intimate and embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Industrial Found.*, 540 S.W.2d at 685. The matters considered to be intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* include sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimacy, psychiatric treatment, attempted suicide, and injuries to reproductive organs. *Id.* at 683; *see also* Open Records Decision No. 659 at 5 (1999).

Section 552.102(a) protects "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]" The protection that section 552.102(a) provides to personnel records corresponds to that which section 552.101 provides under common law privacy and *Industrial Foundation*. *See Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.--Austin 1983, writ ref'd n.r.e.). Employee privacy under section 552.102(a) is narrower than common law privacy under section 552.101, however, because of the greater legitimate public interest in matters involving public employees. *See, e.g.*, Open Records Decision Nos. 473 at 3 (1987), 444 at 3-4 (1986), 423 at 2 (1984). Generally, section 552.102(a) protects employee information from disclosure only when the information in question reveals "intimate details of a highly personal nature." *See* Open Records Decision No. 423 at 2 (1984).

In raising sections 552.101 and 552.102 with regard to the records in question here, the county contends that

a third party, such as [the requestor] who is not involved in any of the grievances filed at the Hidalgo County Head Start Program, would not be entitled to public disclosure of the filed grievances due to it being information in personnel files which is listed as an exception under Government Code section 552.102(a).

We note that the county relies on Open Records Decision No. 191 (1978). That decision was issued prior to the judicial decision in *Hubert v. Harte-Hanks Tex. Newspapers, Inc.* Under

section 552.102(a), as construed by the court in *Hubert*, information may not be withheld from public disclosure if it is of sufficient legitimate interest to the public, even if a person of ordinary sensibilities would object to the release of the information on the grounds that it is highly intimate or embarrassing. *See* Open Records Decision No. 423 at 2 (1984). The public has a legitimate interest in the job performance of public employees. *See* Open Records Decision No. 473 at 3 (1987) (fact that public employee received less than perfect or even very bad evaluation is not highly intimate or embarrassing fact about employee's personal affairs). Therefore, all of the requested records may not be withheld under sections 552.101 and 552.102 in conjunction with common law privacy. However, having carefully examined the records in question, we have marked certain items of information that are protected by common law privacy. The county must withhold that information from the requestor.

Section 552.101 also protects information that is encompassed by statutory confidentiality provisions. The responsive records include information that we believe to be confidential under section 552.101 in conjunction with the federal Family and Medical Leave Act of 1993 (the "FMLA"), 29 U.S.C. § 2654, and section 825.500(e) of title 29 of the Code of Federal Regulations. Section 825.500, which was promulgated pursuant to authority contained in the FMLA, provides in relevant part:

Records and documents relating to medical certifications, recertifications or medical histories of employees or employees' family members, shall be maintained in separate files/records and be treated as confidential medical records.

29 C.F.R. § 825.500(e). Under the FMLA, an employer may require a medical certification from a health care provider to support an FMLA leave request either to care for an employee's seriously ill family member or for leave due to a serious health condition that makes the employee unable to perform the functions of the employee's job. *Id.* § 825.305. Recertification also may be required. *Id.* We have marked the records that the county must withhold under section 552.101 in conjunction with the FMLA.

The submitted records also include information encompassed by chapter 261 of the Family Code, which governs investigations of reported child abuse or neglect. Section 261.201 provides in relevant part:

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). We have marked information that we believe represents files, reports, records, and working papers used or developed in an investigation under chapter 261 of the Family Code. You have not informed us of any rule adopted by the investigating agency that would permit access to the information in question. We therefore assume that no such rule exists. Based on that assumption, we conclude that the information in question is confidential under section 261.201 of the Family Code. *See* Open Records Decision No. 440 (1986) (construing predecessor statute). Consequently, that information is excepted from disclosure under section 552.101 of the Government Code and must not be released.

Chapter 611 of the Health and Safety Code provides for the confidentiality of records created or maintained by a mental health professional. Section 611.002 provides in relevant part:

(a) Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

Health & Safety Code § 611.002(a). Section 611.001 defines a “professional” as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See* Open Records Decision No. 565 (1990). Some of the submitted records are mental health records that are confidential under section 611.002. We have marked those documents. The county may release them only as provided by sections 611.004 and 611.0045.

The submitted information also contains medical records that are governed by the Medical Practice Act (the “MPA”), as codified at subtitle B of title 3 of the Occupations Code. *See* Occ. Code § 151.001. Section 159.002 of the Occupations Code provides in relevant part:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter . . . may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(b), (c). The MPA includes provisions that govern the disclosure of information that is within its purview. *See* Occ. Code §§ 159.003, 159.004, 159.005,

159.006. In construing the predecessor statute, this office held that in governing access to a specific subset of information, the MPA prevails over the more general provisions of chapter 552 of the Government Code.<sup>2</sup> We have marked the medical records that are governed by the Medical Practice Act. Those records may be released only in accordance with the MPA.

The submitted records also contain employee information that may be excepted from disclosure under section 552.117 of the Government Code. Section 552.117(1) excepts from disclosure information relating to the home address, home telephone number, and social security number of a present or former government employee, as well as information revealing whether the employee has family members, *if the present or former employee timely requested that this information be kept confidential under section 552.024*. See Open Records Decision Nos. 622 (1994), 455 (1987). We have marked the information that may be excepted from disclosure under section 552.117. However, the county may not withhold this information in the case of a present or former employee who made the request for confidentiality under section 552.024 after the request for information was made. Whether a particular piece of information is public must be determined at the time the request for it is made. Open Records Decision No. 530 at 5 (1989).

A social security number also may be confidential under section 552.101 in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), *if the social security number was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990*. See Open Records Decision No. 622 at 2-4 (1994). It is not apparent to this office that any social security number in the submitted records is confidential under section 405(c)(2)(C)(viii)(I) of the federal law. You have cited no law, nor are we aware of any law enacted on or after October 1, 1990, that authorizes the county to obtain or maintain a social security number. Therefore, we have no basis for concluding that any social security number contained in the submitted records was obtained or is maintained pursuant to such a statute and is therefore confidential under the federal law. We caution you, however, that chapter 552 of the Government Code imposes criminal penalties for the release of confidential information. See Gov't Code §§ 552.007, .352. Therefore, prior to releasing any social security number, the county should ensure that it was not obtained and is not maintained pursuant to any provision of law enacted on or after October 1, 1990.

Lastly, we also note that the submitted records contain motor vehicle record information that is governed by section 552.130 of the Government Code. Section 552.130 provides in relevant part:

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<sup>2</sup>See Open Records Decision No. 598 (1991). The Seventy-sixth Legislature repealed the predecessor statute, article 4495b of Vernon's Texas Civil Statutes, in enacting the Occupations Code. See Act of May 13, 1999, 76<sup>th</sup> Leg., R.S., ch. 388, §§ 6, 7, 1999 Tex. Gen. Laws 1431, 2439-40. As the enacting legislation was a non-substantive codification, interpretations of the predecessor statute retain their relevance.

(a) Information is excepted from [required public disclosure] if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state;

(2) a motor vehicle title or registration issued by an agency of this state; or

(3) a personal identification document issued by an agency of this state or a local agency authorized to issue an identification document.

Gov't Code § 552.130(a). The county must withhold motor vehicle record information, including a Texas driver's license number, in accordance with section 552.130.

In summary, some of the requested records must be released in accordance with section 552.022(a) of the Government Code. The submitted records also contain information that is excepted from disclosure under section 552.101 of the Government Code in conjunction with common law privacy, the federal Family and Medical Leave Act of 1993, section 261.201 of the Family Code, and section 611.002 of the Health and Safety Code. Responsive medical records are governed by and may be released only in accordance with the Medical Practice Act. Social security numbers, home addresses and telephone numbers, and other personal information relating to present or former county employees may be excepted from disclosure under sections 552.024 and 552.117 of the Government Code. A social security number also may be confidential under section 552.101 in conjunction with federal law. Motor vehicle record information must be withheld in accordance with section 552.130. With these exceptions, the submitted information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the

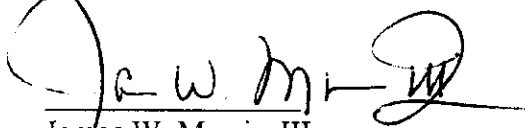
statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read 'J W Morris III', with a stylized flourish at the end.

James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/er

Ref: ID# 141956

Encl: Submitted documents

cc: Ms. Alma Salinas  
The Monitor  
1101 Ash  
McAllen, Texas 78501  
(w/o enclosures)